IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-694, 72-753, 72-791, 72-929

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,
Appellants,

—v.—

EWALD B. NYQUIST, etc., *et al.*,
Appellees.

WARREN M. ANDERSON, as Majority Leader and President Pro Tem. of the New York State Senate,
Appellant,

—v.—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,
Appellees.

EWALD B. NYQUIST, etc., *et al.*,
Appellants,

—v.—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,
Appellees.

PRISCILLA L. CHERRY, *et al.*,
Appellants,

—v.—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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Preliminary Statement

The order of this Court noting probable jurisdiction in No. 72-694, *Committee for Public Education and Religious Liberty* v. *Nyquist*, No. 72-753, *Brydges* v. *Committee for Public Education and Religious Liberty*, No. 72-791, *Nyquist* v. *Committee for Public Education and Religious Liberty*, and No. 72-929, *Cherry* v. *Committee for Public Education and Religious Liberty*, directed that the cases be consolidated. By agreement among counsel, a single Appendix will be filed, each party's brief will cover the issues in all the appeals, and the appellants in 72-694 will be deemed the appellants in the consolidated appeal. The appellants in No. 72-694 will hereinafter be referred to as appellants-appellees, the appellants in the other cases as appellees-appellants.

Opinions Below

The majority and dissenting opinions of the District Court have not yet been reported. Copies of the opinions are set forth as appendices to the respective Jurisdictional Statements. In this brief, page reference will be to the opinions as set forth in No. 72-694 and will be preceded by the letters JS.

Jurisdiction

The decision of the District Court and the judgment thereon were rendered and entered on October 20, 1972. A notice of appeal was filed by appellants-appellees on November 3, 1972. Probable jurisdiction was noted on January 22, 1973.

The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1253. *Lemon* v. *Kurtzman, Earley* v. *DiCenso,* 403 U.S. 602 (1971).

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *

The statute involved in this appeal is Chapter 414 of the 1972 New York Laws, set forth as appendices to the respective Jurisdictional Statements herein. In this brief, page references will be to the statute as set forth in No. 72-694 and will be preceded by the letters JS.

Questions Presented*

1. Does Section 1 of Chapter 414 of the 1972 New York Laws (hereinafter referred to as the Act), which provides for grants to church-controlled and church-operated schools for maintenance, repair and physical operation, violate the Establishment Clause of the First Amendment to the United States Constitution?

2. Does Section 2 of the Act, which provides reimbursement of up to 50% of the tuition paid to such schools, violate the Establishment Clause?

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* Although appellants-appellees are appellees in respect to Sections 1 and 2 of the challenged statute, for reasons of logic and convenience we present and argue the questions in the same order as they appear in the statute and were argued and decided in the court below.

3. Do Sections 3, 4 and 5, which provide tax credits for tuition paid to such schools, violate the Establishment Clause?

4. If the answers to Questions 1 and 2 or either of them are in the affirmative and the answer to Question 3 in the negative, are Sections 3, 4 and 5 severable?

Statement of the Case

Chapter 414, the fourth of a series of laws enacted within two years which have been challenged as violative of the Establishment Clause,[1] contains five parts: (1) Section 1, which provides moneys to nonpublic schools for maintenance and repairs; (2) Section 2, which provides flat tuition grants to parents of pupils of low income families attending nonpublic schools; (3) Sections 3, 4 and 5, providing for tax credits for parents in middle and upper income families; (4) Sections 6 and 7, providing for impacted aid to public schools which have increased enrollment due to the closing of nonpublic schools, and (5) Sections 8, 9 and 10 which provide for the purchase of nonpublic school build-

[1] Chapter 138, Laws of 1970, financing "mandated services" in nonpublic schools, was declared unconstitutional in *Committee for Public Education and Religious Liberty* v. *Levitt*, 342 F. Supp. 439 (S.D. N.Y. 1972), probable jurisdiction noted 93 S. Ct. 316. Chapter 822, Laws of 1971, providing for payment of salaries of nonpublic school teachers, was held unconstitutional in *Committee for Public Education and Religious Liberty* v. *Levitt*, S.D. N.Y. 1971, unreported; no appeal was taken from that judgment. Chapter 996, Laws of 1972, confers jurisdiction on the State Court of Claims to accept claims from nonpublic schools for loss of payments by reason of the invalidation of the "mandated services" law; a suit challenging the constitutionality of the statute is pending in the United States District Court for the Southern District of New York, *Committee for Public Education and Religious Liberty* v. *Court of Claims*, 72 Civ. 2493.

ings by public school districts where the nonpublic school has closed down.

It is conceded by all parties that the nonpublic schools referred to throughout the Act include schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial and dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.[2]

As explained by Judge Gurfein (JS 6a-8a), Sections 3, 4 and 5 of the Act provide that an individual shall be entitled to subtract, for State income tax purposes, from his Federal adjusted gross income an amount shown in a table for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a nonprofit public school on a full time basis, provided that he has paid at least fifty dollars in tuition for each such de-

[2] The complaint, paragraphs 8, 9 and 10, alleges that Chapter 414 is so construed and applied by the State of New York. The answer of the State does not deny this allegation. The answers of the respective intervenors-appellees-appellants do. However, they did not contest this allegation in the District Court and in any event based their motion for summary judgment dismissing the complaint in respect to Sections 3, 4 and 5 of Chapter 414 on the absence of any contested issue of facts. See paragraph 4 of Affidavit of Jean M. Coon in support of motion for summary judgment. It is thus clear that they too no longer challenge the allegation.

pendent.[3] This exclusion may be taken only by parents with adjusted gross incomes of from $5,000 under Section 2. The exclusion would be as much as $1,000 for each child, up to three children, enrolled in grades 1 through 12 with the net benefit to taxpayers as shown in the footnote. The amount of income that may be excluded is reduced as the individual's adjusted gross income increases. The exclusion is deducted from adjusted gross income and is available to taxpayers whether they itemize or take the standard deduction.

The appellants-appellees herein, an organization committed to the protection of public education and religious liberty, and a number of taxpayers some of whom are parents of children attending public schools, instituted suit

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[3] The table is as follows:

If New York adjusted gross income is:	The amount allowable for each dependent is:
Less than $9,000	$1,000
9,000-10,999	850
11,000-12,999	700
13,000-14,999	550
15,000-16,999	400
17,000-18,999	250
19,000-20,999	150
21,000-22,999	125
23,000-24,999	100
25,000 and over	0

Estimated Net Benefit to Family (see JS 45a)

One Child	Two Children	Three or more
$50.00	$100.00	$150.00
42.50	85.00	127.50
42.00	84.00	126.00
38.50	77.00	115.50
32.00	64.00	96.00
22.50	45.00	67.50
15.00	30.00	45.00
13.75	27.50	41.25
12.00	24.00	36.00
—0—	—0—	—0—

challenging the constitutionality under the Establishment and Free Exercise Clauses of only parts 1, 2 and 3 (Sections 1-5) of the Act, and seeking judgment declaring their unconstitutionality and enjoining their enforcement.

Separate motions for intervention as parties defendant were made by a group of parents of children in nonpublic schools and by State Senator Earl W. Brydges, as Majority Leader and President *pro tempore* of the New York State Senate. Both motions were granted.

A three-judge court was duly convened, consisting of Circuit Court Judge Paul R. Hays and District Court Judges John M. Cannella and Murray I. Gurfein. After a hearing on the merits, the Court unanimously held parts 1 and 2 of the Act violative of the Establishment Clause. As to part 3, the Court was divided: Judges Cannella and Gurfein in an opinion written by the latter, held that this part did not violate the Establishment Clause; Judge Hays dissented. Judges Cannella and Gurfein also held that part 3 was severable from parts 1 and 2, and as to this too Judge Hays dissented.

Cross-appeals were filed by all the parties and in each case probable jurisdiction was noted by this Court.

State Senator Earl W. Brydges, having retired, Warren M. Anderson, his successor as President *pro tempore* of the New York State Senate, was substituted for him as intervenor-appellee-appellant.

Summary of Argument

Three tests have been used by this Court for measuring constitutionality under the Establishment Clause. They are: (1) the *Everson* test, which forbids financial support or subsidization of sectarian instruction or religious worship; (2) the *Schempp* test, which forbids governmental action whose purpose or primary effect is to advance religion; and (3) the *Walz* test which forbids governmental action that involves excessive entanglement in religion. Whichever of these tests is used, the result is the same; all the challenged provisions of the Act on their face and as construed and applied by the State of New York violate the Establishment Clause.

This Court has emphasized the historic background of challenged action and has accorded great weight to the long duration and universality of a challenged practice. Neither long duration nor widespread acceptance supports the constitutionality of any of the provisions of the Act here in issue; to the contrary, whatever history there is strongly suggests unconstitutionality.

While Section 1 of the Act, providing for maintenance, repair and operations, might possibly stand alone, Section 2, dealing with tuition rebates, and Sections 3, 4 and 5, providing for tax credits, are so clearly inextricably integrated that they must be adjudged to be inseverable and the unconstitutionality of either requires that the other be declared inoperative.

ARGUMENT

I.

The Establishment Clause forbids (1) governmental subsidization of sectarian instruction or religious worship, (2) action whose purpose or primary effect is to advance religion, and (3) excessive entanglement in religion.

A. *The Everson Principle*

In *Everson* v. *Board of Education*, 330 U.S. 1 (1947), the Court announced the principle that neither the Federal Government nor a state may, under the Establishment Clause, subsidize or finance sectarian instruction or religious worship. Since the challenged statute was upheld, this constituted dictum in *Everson*, and the opinion has itself been subject to criticism as being overbroad in its language.[4] However, what was dictum in *Everson* became holding in later cases, such as *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and *Tilton* v. *Richardson*, 403 U.S. 672 (1971). Moreover, the criticism of the overbroad language of the *Everson* opinion in no way impaired the validity and viability of the underlying principle.

Thus, in *McCollum* the Court held that the *Everson* principle rendered unconstitutional a program of religious instruction on public school premises since the use of the premises constituted subsidization of the instruction.

In *Zorach* v. *Clauson*, 343 U.S. 306 (1952), the Court upheld the constitutionality of a program of released time for

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[4] See, e.g. *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664, 670-71 (1970).

religious education under which children would be released from public school for one hour a week to receive religious instruction in church schools, because no expenditure of public funds or use of public buildings was involved. The Court said: "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education . . ." (343 U.S. at 314).

In *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) the Court in invalidating devotional Bible reading in public schools, quoted from Mr. Justice Jackson's dissenting opinion in *Everson* that "There is no answer to the proposition * * * that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby supported in whole or in part at the taxpayers' expense" (374 U.S. at 216).

In *Board of Education* v. *Allen,* 392 U.S. 236 (1963) the Court held, as it had in *Everson,* that where a state undertakes a secular program for the benefit of children, the program is not constitutionally impermissible merely because as an incidental by-product thereof religious educational institutions might benefit. That is a far cry from saying that government may make a direct financial grant to such an institution. This the Court made clear in the following language:

> . . . The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. *Thus no funds or books are furnished to*

> *parochial schools, the financial benefit is to parents and children, not to schools.* Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution. (392 U.S. 243-244. Emphasis added.)

As if to underline the critical distinction between aiding children and their parents on one hand and a direct financial grant to the religious institutions, the Court stated:

> It should be noted that the record contains no evidence that any of the private schools in appellants' districts previously provided textbooks for their students. There is some evidence that at least some of the schools did not; intervenor defendants [parents of children attending parochial schools] asserted that they had previously purchased all their children's textbooks. . . . (*Ibid.*).

Thus, *Allen,* unlike the present case, presents no instance of governmental financing relieving the sectarian school of an expenditure which it otherwise would have made.

In *Walz* v. *Tax Commission of the City of New York,* 397 U.S. 664 (1970), the Court in upholding the tax exemptability of religious institutions made it quite clear that it was not sanctioning governmental subsidization of religious instruction or worship. The whole tenor of the decision reflects a constitutional distinction between subsidy and exemption and an avoidance of anything that might be construed to impair the vitality of the basic *Everson* principle. Thus, the Court emphasized that

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to the churches but simply abstains from demanding that the church support the state. * * * (397 U.S. at 655)

Again, the Court said (at 674-675):

> Granting tax exemptions to churches necessarily operates to afford an *indirect* economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. *In analyzing either alternative the questions are whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case.* The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid. (Emphasis added.)

In *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso*, 403 U.S. 602 (1971), the Court again relied on the *Everson* principle to invalidate state subsidization of the salaries of teachers of secular subjects in sectarian schools. Mr. Justice White,

the only dissenter in *DiCenso*, concurred in the reversal and remand in *Lemon* on the ground that if the statute authorized "blending of sectarian and secular instruction" this "would establish financing of religious instruction by the State" (403 U.S. at 670-671), and thus would violate the Establishment Clause.

In *Tilton*, the Court was unanimous in invalidating that part of the Higher Education and Facilities Act of 1963 which authorized the use of Federally financed buildings for sectarian instruction or religious worship after twenty years.

These, and other cases that might be cited,[5] show that if there is any proposition in constitutional law which is firmly established it is that under the Establishment Clause government may not finance sectarian instruction or religious worship.

B. *The Schempp Test*

In *Schempp*, the Court, in invalidating a Bible reading statute under the Establishment Clause, said:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion (374 U.S. at 222).

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[5] E.g., *Johnson* v. *Sanders*, 319 F. Supp. 421 (D.C. Conn.) affirmed 403 U.S. 955 (1971); *Wolman* v. *Essex*, 342 F. Supp. 399 (E.D. Ohio) affirmed —— U.S. ——, 93 S. Ct. 61 (1972).

In *McGowan* v. *Maryland*, 366 U.S. 420, 453 (1961), the Court said:

> • • • We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.

In *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), the Court resorted to history to establish that the purpose of a facially neutral law forbidding the teaching of evolution in publicly financed schools was to protect the fundamentalist interpretation of Genesis and the law could therefore not stand under the *Schempp* purpose-effect test.

Nevertheless, the Court has been more than reluctant to go behind the stated legislative purpose in measures for aid to religious schools,[6] although it thereby practically eliminated purpose for the purpose-effect test, and has at least implicitly recognized what every newspaper reader knows, that sectarian pressures play a significant if not major role in the enactment of such measures.[7] Each of the three parts of the Act contains a long recital of secular legislative purposes and in view of this Court's apparently firm policy of taking such recitals at face value, it would probably be fruitless to seek to show that there is less secularity therein than meets the eye. Yet, in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), 92 S. Ct. 1526, the most recent exposition by the Court of the meaning and significance of the religion clauses

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[6] *Allen*, 392 U.S. at 243; *Lemon*, 403 U.S. at 612.

[7] *Lemon*, 403 U.S. at 622-624.

the First Amendment, the relation of legislatively de-
red secular purpose to the values of the Establishment
use was placed in proper perspective. The Court there
d (406 U.S. at 214-15):

> Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. The invalidation of financial aid to parochial schools by government grants for a salary subsidy for teachers is but one example of the extent to which courts have gone in this regard, notwithstanding that such aid programs were legislatively determined to be in the public interest and the service of sound educational policy by States and by Congress. Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672 (1971). See also Everson v. Board of Education, 330 U.S. 1, 18 (1947).

n any event, however secular its purpose a statute can-
be upheld under the *Schempp* test if a primary effect is
dvance religion. In *Lemon-DiCenso,* the Court, having
ermined that the statutes were unconstitutional under
entanglement test, did not find it necessary to consider
n under the purpose-effect test. In *DiCenso,* the District
rt did address itself to the latter test and held the

Rhode Island statute unconstitutional under that test as well as under the entanglement test. Judge Coffin, speaking for the Court, said (316 F. Supp. 112):

> The second part of the *Schempp* test—determining the statute's "primary effect"—presents a more difficult problem of both definition and application. Plaintiffs have argued that "primary" means "essential" or "fundamental." Defendants and intervenors have taken a more literal position, claiming that "primary" means "first in order of importance." The problem of definition is critical in this case because, as we have noted in our findings, the Act has two significant effects; on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is "the primary effect", as *Schempp* seems to require, are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance.
>
> Intervenors, in an effort to give shape to the *Schempp* test, have urged us to focus solely on the activity subsidized in judging effect. In other words, intervenors propose that we examine only the activities of the teachers receiving aid and ignore the religious nature of the schools in which they teach. Such a narrow perspective, however, strikes us as unrealistic when examining direct financial aid to denominational schools. The expenses of a religious institution may be apportioned in a variety of ways among its "secular" and "religious" activities. Under plaintiffs' [intervenors' (!)] proposed test, sophisticated bookkeeping could pave the way for almost total subsidy of a re-

> ligious institution by assigning the bulk of the institution's expenses to "secular" activities. • • •

In a footnote, Judge Coffin added:

> Our brother in dissent accepts intervenors' narrow view of the *Allen* test. However, in *Allen* there was no record on which to predicate a finding that the effect of the statute would differ from its declared purpose. Moreover, as our findings indicate, the "religious enterprise" assisted in this case is not the discrete teaching of religion, but the maintenance of an educational environment within which religious instruction takes place in varied ways. McCollum v. Board of Education, 333 U.S. 203 (1948), suggests to us that such an environment may not be maintained at public expense. • • •

In *Tilton*, the Court held that the challenged statute did not on its face necessarily call for excessive entanglement with religion. Accordingly, it found it necessary to consider it under the purpose-effect test. Again it held that the purpose was secular and that its primary effect, as a whole, was likewise secular both on its face and in its application, finding that while the four defendant colleges were church-related, they were not sectarian, and noting that in other instances the government had disqualified colleges found to be sectarian (403 U.S. at 682). However, what is most relevant to the present case is that the Court in *Tilton* held that the provision allowing facilities partly financed with Federal funds to be used for sectarian instruction and religious worship after 20 years did in fact have a primary effect which necessarily advanced religion and therefore was unconstitutional on its face.

C. *The Walz Test: Entanglement*

In *Walz*, the Court held that even if the purpose and primary effect of a statute is secular, the statute cannot stand under the Establishment Clause if it brings with it an excessive entanglement of government with religion. The Court said (397 U.S. at 674):

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. * * *

In *Lemon*, the Court went out of its way to point out that the holding in *Walz* "tended to confine rather than enlarge the area of permissible state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship" (403 U.S. at 614). The Court said further (at 615):

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority. * * *

For that reason, the complaint in this case alleged that the Act both on its face and as administered, encompasses as permissible beneficiaries schools which impose religious restrictions on admissions, require attendance of pupils at religious exercises, require obedience by students to the doctrines and dogmas of a particular faith, are an integral part of the religious mission of the church sponsoring them, have

as a substantial purpose the inculcation of religious values, impose religious restrictions on faculty appointments, and impose religious restrictions on what or how the faculty may teach.

These indicia of religiosity were culled from the various opinions in *Lemon, DiCenso* and *Tilton* and indicate the "character and purposes" of institutions which the Court would hold ineligible under the *Walz* test. In *Tilton,* the plurality opinion deemed use of such a "profile" to be inappropriate because none of the defendant colleges fitted the profile and colleges which did were held by the government to be ineligible to receive benefits (403 U.S. at 682).

The exact opposite is the case here. As we have pointed out (*supra,* p. 5), all parties concede that institutions fitting this description are eligible to receive benefits under the Act. It may well be that there are few schools in New York which fit the profile in every detail, but it is quite obvious that far less is necessary to establish unconstitutionality; indeed, we suggest, any one of them would be enough. Thus, Mr. Justice White, in his concurring-dissenting opinion in *Tilton-Lemon-DiCenso* stated that if any school restricted entry on religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith, the legislation would to that extent be unconstitutional (403 U.S. at 671, footnote 2). Similarly, it is difficult to see how, in the light of *Epperson,* government can finance schools which impose religious restrictions on what or how the faculty may teach.

D. *The Test of Time and Place*

In *Walz* both the Court's opinion by the Chief Justice (397 U.S. at 675-678) and the concurring opinion of Mr. Justice Brennan (at 681-688) stressed that tax exemption for churches went back to the earliest days of the Republic; both quoted the comment of Mr. Justice Holmes in *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921) that "a page of history is worth a volume of logic." Both stressed the fact that tax exemption for churches is a universal practice in effect in every one of the states. The antiquity and ubiquity of tax exemption is strong if not conclusive evidence of its constitutionality.

In the present case, however, history and practice point in the opposite direction. In respect to the three challenged parts of the Act herein, whatever history there is establishes constitutional unacceptability rather than the reverse. While most of the relevant cases were decided before the Court held in *Everson* that the restrictions of the Establishment Clause were applicable to the States and therefore were based on state constitutional provisions forbidding tax-support for religious schools, Mr. Justice Brennan pointed out in his concurring-dissenting opinion in *Lemon-DiCenso-Tilton* that the Establishment Clause and these provisions are all part of the same uniform and long-standing constitutional tradition and history (403 U.S. at 645-650).

II.

Whether measured by *Everson*, *Schempp* or *Walz*, each of the three challenged parts of the Act violates the Establishment Clause.

A. *Maintenance, Repair and Physical Operations*

1. The Provisions of Section 1

Section 1 of the Act provides for grants of money directly to nonpublic schools for "maintenance and repair" if the nonpublic school has been designated during a base year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U.S.C.A. §425). If the school qualifies under the Federal standards, it is to be given a direct grant of $30 per pupil in attendance, which is increased to $40 per pupil to those schools which are more than twenty-five years old. The grants are stated to be in reimbursement of "maintenance and repair" costs incurred in the preceding year. "Maintenance and repair" is defined as "the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner [the State Commissioner of Education] may deem necessary to ensure the health, welfare and safety of enrolled pupils." Each qualifying school which seeks an apportionment is required to submit to the Commissioner an application which shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year. The per pupil annual allowance may not exceed

50% of the average per pupil cost of equivalent maintenance and repair in the public schools, and the total allotted to a nonpublic school may not exceed the amount expended for maintenance and repair in that school's base year. (JS 48a-49a)

2. Subsidization

It is hardly open to question that an unrestricted per pupil grant of tax-raised funds to religious schools would violate the Establishment Clause. The sole basis therefore upon which the appellees-appellants contend and can contend for constitutionality in the present case is that the grants are purportedly earmarked to pay for maintenance and repair costs. We believe that this reliance is completely unfounded.

It is true, of course, that in *Everson* the Court upheld the constitutionality of a statute appropriating public funds for transportation to religious schools, and in *Allen* it held the same in respect to a statute authorizing the loan of secular textbooks to pupils in such schools. But in *Everson* the Court was careful to point out that the statute there approached "the verge of [constitutional] power" (330 U.S. at 16); and in *Lemon* the Court indicated that it was not prepared to go any further than permitted by these decisions, namely, "[b]us transportation, school lunches, public health services, and secular textbooks supplied in common to all students • • • " (403 U.S. at 616-617).

The open-ended definition of "maintenance and repair" ("and such other items as the commissioner may deem necessary to insure the health, welfare and safety of enrolled pupils") encompasses practically everything in a school's budget other than teachers' salaries. (*Lemon*-

DiCenso foreclosed including that item.) It is significant and quite correct that in the Jurisdictional Statement of the appellees-appellants State of New York (p. 6) the "Questions Presented" describes the grants under Section 1 as being for "maintenance, repair and physical operation." Can *Everson* or anything else this Court has said in any case be interpreted as allowing government to subsidize the physical operations of religious schools? Is that not precisely what the appellees-appellants are asking the Court to do?

Section 1 of the Act allows a grant to a nonpublic school of a sum equalling the total of its expenditures for maintenance, repairs and operations so long as that amount does not exceed 50% of the state-wide average of public school expenditures for those purposes (Article 12, §551(1), JS 49a). It is not impossible that by reason of efficient management or geographic and other factors the total amount expended in a particular religious school for these purposes will not exceed 50% of the state-wide public school average. In such case, or in any case in which the amount received by a religious school exceeds that necessary to cover the operation costs of the secular aspects of instruction, would not the state be subsidizing in whole or in part sectarian instruction and religious worship, assuming that in any case they could be severed from the secular aspects of the school's operations? Is it conceivable that *Everson* allows this?

We do not wish to extend this brief by lengthy quotations from the District Court's opinion, but we believe the following is especially cogent and relevant to the *Everson* aspect of Section 1 and therefore set it forth here:

The argument is made, however, that since janitorial functions and snow removal obviously are not the teaching of religion, their neutral character permits a benevolent grant for these purposes from the tax raised funds in the State Treasury. The argument is bottomed on the assumption that a parochial school budget is divisible. It rejects the argument that once a public subsidy is given it lightens the burden on the rest of the budget and even permits more of the other private money to be used for religious instruction. Not having to pay the janitor makes it reasonable to assume that the money otherwise going to him can be used to increase the salary of a religious teacher or the fund for the purchase of objects of religious devotion. If it be argued that the subsidy would go only to the needy parochial school which has no surplus to apportion, the short answer is, of course, that such a parochial school would have more than it has now, for it does now pay from its present budget for janitor services and heat.

The vice, moreover, is not only that the school budget as such is indivisible, but that no effort is made in this part of the statute to distinguish between secular and religious education. The janitorial service embraces cleaning the chapel, where there is one, and heat is provided in the classrooms where religion is taught. There is no suggestion that heat is to be cut off while prayer or religious teaching is conducted in the same schoolroom. *Cf. Illinois ex rel. McCollum* v. *Board of Education,* 333 U.S. 203, 211 (1948). (JS 21a-22a)

We do not see how the unconstitutionality of the statute can be avoided by calling it one for "Health and Safety

Grants for Nonpublic School Children." In the first place, although the State does require that nonpublic schools providing instruction for children be safe and sanitary, that fact does not mean that the Establishment Clause permits the State to finance the maintenance, repair and operations of such schools. Moreover, children do not attend only church schools; they attend also churches and Sunday schools, and these too must be safe and sanitary. Does this mean that the State can constitutionally repair and provide coal and oil for churches and Sunday schools? Finally, suppose it is found that a particular nonpublic school is beyond repair. Can the State finance the construction of a new safe and sanitary building in which religion is taught and practiced? *Tilton* states clearly that it may not.

For the same reasons, we do not see how it is constitutionally significant that the qualifying schools must be located in low income areas. The Constitution of the United States extends to these no less than to other areas. It forbids tax supported maintenance and repairs of church schools in these areas no less than churches located there. We know of no decision of any court, state or Federal, which has ruled to the contrary.

3. Purpose and Effect

What we have said concerning subsidization is equally applicable to purpose-effect. As was noted in *Lemon* (403 U.S. at 621):

> The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related schools. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided

> to the student and his parents—not to the church-related school. • • •

In *Allen,* the Court after finding that there was no subsidization within the *Everson* concept, considered and upheld the challenged statute under the purpose-effect test. It stressed that the books loaned to the pupils were completely secular and thus the statute did not advance religion. In the present case, as we have seen, the funds received from the State may permissibly be used to finance the operations of even those parts of the church school premises as are used exclusively for sectarian instruction or religious worship, as, for example, the school chapel. Under any interpretation of the purpose-effect test, this certainly constitutes advancement of religion.

In *Lemon,* the Court emphasized that under the Establishment Clause a State may not allow its funds to be used in whole or in part to aid the teaching of religion. The Court said (at 619):

> • • • The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion.

Section 1 of the Act challenged here contains no such safeguards, and for that reason alone must be adjudged unconstitutional.

4. Entanglement

However, even if the State should change its procedures and read into the Act a provision that none of the granted funds be used to finance the operations of a school to the extent that it engages in sectarian instruction or religious worship, the statute would still be unconstitutional, for it would then propel the State into excessive entanglement with religion. It would require of the State that "comprehensive, discriminating and continuing state surveillance" which *Lemon-DiCenso* held to be constitutionally impermissible (*ibid.*).

The plurality opinion in *Tilton* distinguished *Lemon-DiCenso* on two grounds: First, *Tilton* involved colleges, while *Lemon-DiCenso* involved elementary and secondary schools. Second, the *Tilton* statute authorized a one-time single purpose grant, while *Lemon-DiCenso* authorized continuing financial relationships.

In respect to the first ground, the Court said (at 687):

> Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and

religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspection that States impose over all private schools within the reach of compulsory education laws.

In respect to the second, the Court said (at 688):

> Finally, government entanglements with religion are reduced by the circumstance that, unlike the direct and continuing payments under the Pennsylvania program, and all the incidents of regulation and surveillance, the Government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact.

Neither of these two distinguishing factors is present in Chapter 414. The beneficiaries of the Act are not colleges but elementary and secondary schools, and the financing and the auditing takes place annually rather than only once for all time. Absent these two distinguishing factors, it is clear that the Act falls within the strictures of *Lemon-DiCenso.*

But most important is the Court's disposition of the twenty-year limitation in the Federal statute. All the Justices agreed that buildings financed with tax-raised funds could never—not even after twenty years—be used for sectarian instruction or religious worship. In the present case, the statute on its face permits such use at all times, even within a day after the state grant is received. We cannot

see how such a law can stand under the Supreme Court's decisions in *Lemon-DiCenso* and *Tilton.*

Finally, we note that even in *Tilton,* Mr. Justice White, whose vote made up the majority upholding the statute on its face, was careful to state that the statute would be unconstitutional even if no sectarian instruction or religious worship took place in the publicly financed facilities if "any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith" (403 U.S. at 671). In the present case, as we have noted, it is conceded that the statute applies equally to schools which do exactly that.

5. Time and Place

In considering the inference of constitutionality or unconstitutionality from the acceptance or non-acceptance in time and place, we suggest that it is significant that Section 1 of the Act is in direct and literal violation of Article XI, Section 3 of the New York State constitution, which expressly forbids the use of tax-raised funds "in aid or maintenance" of sectarian schools.

In the numerous reported decisions interpreting and applying the state constitutional provisions, our research has failed to disclose a single decision upholding the use of tax-raised funds to maintain or repair sectarian schools. Every decision we have read simply forbids state subsidization of the maintenance or operation of sectarian schools without the slightest indication that subsidization of repairs, fuel costs or janitorial services is not within the prohibition.[8]

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[8] The literature on the subject is voluminous. See, *inter alia,* A. Johnson and F. Yost, *Separation of Church and State in the*

6. Summary of Argument on Section 1

We again borrow from the opinion of Judge Gurfein to summarize our argument in respect to Section 1:

> To summarize our reluctant conclusion that we cannot sustain a direct public subsidy for the "maintenance and repair of religious schools" under the guidelines of the Supreme Court, our points of departure with the argument of the State of New York are that: (1) "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to *teach* or practice religion." *Everson, supra,* 330 U.S. at 16 (emphasis added). We think *Tilton* does not overrule the application of the dictum to the case at bar. (2) The statute involved, though concentrating on schools in deprived areas, makes no distinction between secular and religious teaching, and tax-raised funds are directly used for the maintenance of buildings which teach religion. (3) We cannot accept the view that, under present doctrine, budgets for churches, synagogues or parochial schools can be made divisible by ascribing a percentage of cost to neutral functions. (4) On the contrary, we interpret the dictum of the Supreme Court that neutral services may be afforded to parochial schools to mean simply that general services, such as transportation, secular books, free lunches and,

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United States (1948); W. Torpey, *Judicial Doctrines of Religious Rights in America* (1948); L. Pfeffer, *Church, State and Freedom* (Rev. Ed. 1967); C. Antieu, P. Carroll and T. Burke, *Religion* Under the State Constitutions (1965); C. Zollman, *American Church Law* (1933); Note, "Catholic Schools and Public Money," 50 *Yale L.J.* 917 (1941); R. Gabel, *Public Funds for Church and Private Schools* (1937).

perhaps, athletic training, visiting nurses and the like, afforded to students in *all* schools may also be made available to students in parochial schools. (5) We think that, unlike the one-time construction of new buildings as in *Tilton,* the "maintenance and repair" provisions of the New York statute involve "continuing financial" and political "relationships [and] dependencies." *Tilton, supra,* 403 U.S. at 688.

In sum, we hold that, although we accept the intention of the legislation as being essentially secular and within the police power of the State, the effect of Section 1 of the statute in its present form is inevitably to advance religion. We hold, alternatively, that that Section creates a potentially excessive entanglement of the State with religion with potentially undesirable consequences to both (JS 24a-26a).

B. *Tuition Grants*

1. The Provisions of Section 2

Section 2 of the Act provides for flat tuition grants from the State Treasury to parents with family incomes of less than $5,000 per annum who have children attending elementary or secondary nonpublic schools. The grant is in the sum of $50 a year for children in grades 1 through 8, and $100 in grades 9 through 12. The tuition reimbursement cannot exceed 50% of the actual tuition payment made by the parent. The Commissioner is given "responsibility for the administration of the program" and is given authority to "promulgate such regulations as are necessary to carry out the provisions of this article." This section is entitled "Elementary and Secondary Education Opportunity Program."

2. Subsidization

It is, of course, incontestable that a direct per-pupil grant of tax-raised funds to church schools would constitute subsidization impermissible under the Establishment Clause. Nor can it be doubted that the result would be the same if the amount of the grant were equal to or less than that proportion of the education costs as is allocable to instruction in secular subjects; whatever doubts may have existed on that score were put to rest by *Lemon-DiCenso* and by *Tilton*. Hence, it is not constitutionally significant that Section 2 limits reimbursement to half the tuition paid, and that the legislature could have found that on the average at least 50% of education costs in church schools are allocable to secular instruction. (In *Tilton*, the Court held that governmentally financed facilities could not be used for sectarian instruction or religious worship even though the Federal grants were limited to 50% of the construction cost.)

The only conceivable constitutional justification for Section 2, therefore, must lie in the fact that the subsidization is not to the schools directly but to the parents in the form of reimbursement for tuition paid. Initially, we suggest that it is not constitutionally material that the payments are made to the parents in reimbursement for tuition already paid rather than in advance for tuition to be paid. In the first place, the payments to parents in *Everson* were in the form of reimbursement for transit fares already paid[9] and none of the Justices suggested that this had any constitutional significance. Secondly, the salary supplements invalidated in *DiCenso* were paid to teachers for services

[9] 330 U.S. at 3.

already rendered, and again there was no indication in any of the opinions in that case that this had constitutional significance. Finally, although the parent receives his grant after he has paid the tuition, the receipt is conditioned upon his having made the payment, and we do not think that the First Amendment distinguishes between conditions precedent and subsequent.

Three different United States District Courts have considered and passed on, almost simultaneously, the constitutionality of tuition grants for church school attendance—the present case, *Lemon* v. *Sloan* in the Eastern District of Pennsylvania (probable jurisdiction noted, October Term, 1972, No. 72-459), and *Wolman* v. *Essex*, 342 F. Supp. 399 (S.D. Ohio) which this Court affirmed earlier this Term without argument. —— U.S. ——, 93 S. Ct. 61. These decisions, arrived at in at least two of the instances independently of each other, were all unanimous. Thus, nine Court of Appeals and District Court judges have found tuition laws violative of the Establishment Clause and none has found to the contrary. In addition, all but one member of this Court but a few months ago determined that the case to the contrary is so lacking in merit as not to justify oral argument.

Moreover, the Federal courts have been equally unanimous in equating tuitions and subsidies in the Equal Protection context of racial segregation, as Mr. Justice Douglas noted in his concurring-dissenting opinion in *Lemon-DiCenso-Tilton*.[10] The thrust of these decisions is summed

[10] 403 U.S. at 633, footnote 17. The cases cited are: *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Hall* v. *St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La.), aff'd 368 U.S. 515 (1962); *Lee* v. *Macon County Bd.*,

up as follows in *Griffin* v. *State Board of Education*, 239 F. Supp. 560, 563 (E.D. Va. 1965):

> [W]e think the State cannot ignore any plain misuse to which a grant has been or is intended to be put. *Nor do we think weight is to be accorded the fact that the money is paid to the pupil or parent and not to the school, for the pupil or parent is a mere channel . . .* These premises of decision have especial significance here because the issue is the right of the State or locality to make, and not the right of pupils, parents or schools to take, the grants. (Citation omitted. Emphasis supplied.)

It is no answer that these cases concern racial exclusion whereas the statute challenged herein involves religious exclusion. Where governmental subsidization is the issue, the four members of this Court who, going out of their way, commented on the question could find no constitutional distinction between them.[11] The reason for this is that the question is not the right of private institutions to exclude on the basis of religion or race, but the constitutional power of government to subsidize their operations, and as to this Establishment is no less a constitutional concern than is

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267 F. Supp. 458 (M.D. Al.), aff'd sub nom. *Wallace* v. *United States*, 389 U.S. 215 (1967); *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La.), aff'd 389 U.S. 571 (1967); *Brown* v. *South Carolina State Bd.*, 296 F. Supp. 199, aff'd 393 U.S. 222 (1968); *Coffey* v. *State Educ. Finance Commission*, 296 F. Supp. 1389 (S.D. Miss. 1969); *Lee* v. *Macon County Bd.*, 231 F. Supp. 743 (M.D. Al.).

[11] Mr. Justice Douglas and Mr. Justice Black (concurring with him), note 10 *supra;* Mr. Justice Brennan, concurring and dissenting in *Lemon-DiCenso-Tilton*, 403 U.S. at 644, footnote 1; Mr. Justice White, at 671, footnote 2.

Equal Protection. If tuition grants are subsidization under the latter Clause they are not less than that under the former.

The crux of the matter is that, whether characterized as "conduit," "channel" or other synonym, tuition grants have no meaning except as a "transfer [of] part of [government] revenue" (*Walz*, 397 U.S. at 675). This is no less true in respect to religious schools than racial schools, and is equally unconstitutional in both.

3. Purpose and Effect

Section 2 of the Act omits any provision that no part of the tuition grant shall be used to pay for sectarian instruction or religious worship. Tuition bills and receipts used in religious schools do not generally set forth separately the amounts allocable to religious and secular studies, and in any event the statute does not require a separate statement. There is therefore no assurance that at least part of the grant will not be used for that purpose. As in respect to Section 1, it cannot be assumed that in all cases no more than 50% of the tuition will be used for sectarian instruction and religious worship. What Section 2 therefore authorizes is the use of government granted funds to advance religion.

On this point, *Tilton* is conclusive. There the Court held that the provision permitting use after 20 years of a facility half of the cost of which was financed by the Federal Government, violated the purpose-effect test since it was "inadequate to insure that the impact of the federal aid will not advance religion" (403 U.S. at 682). The Court said (at 683):

> Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. Congress did not base the 20-year provision on any contrary conclusion. If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.

That the amount of each tuition bill allocable to religion may by itself be small (although in the aggregate it could be relatively as substantial as half the value of the use of a facility after 20 years) is not constitutionally significant. The monetary value of the use of a public school classroom to recite a 22-word prayer or a few verses from the Bible is obviously very small, but that fact did not render a law permitting it immune to successful challenge under the Establishment Clause in *Engel* v. *Vitale,* 370 U.S. 421 (1962) and *Schempp, supra.* In *Frothingham* v. *Mellon,* 262 U.S. 447, 487 (1923), the Court rejected a taxpayer's suit against the Federal Government on the ground that "his interest in the moneys of the Treasury—partly realized from tuition and partly from other sources—is shared with millions of others; it is comparatively minute and indeterminable * * *." But in *Flast* v. *Cohen,* 392 U.S. 83 (1968), the Court, quoting (at 103) from Madison's Memorial and Remonstrance that "the same authority which can force a citizen to contribute three pence only of his

property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever," held that a taxpayer did have standing to challenge a Federal grant of funds that could be used for sectarian instruction or religious worship.

4. Entanglement

The absence from Section 2 of any provision adequate to insure that the State aid will not advance religion renders it unconstitutional under the purpose-effect test. However, even if the statute did so provide or the Commissioner would issue regulations requiring separate tuition bills and receipts for secular and sectarian instruction and limit the payments to the amounts set forth in the former, the law as applied would still be unconstitutional. The reason for this is that in seeking to avoid the Scylla of advancement the State would be engulfed in the Charybdis of entanglement.

We do not believe it necessary to expand on this point. Everything the Court said in *Lemon-DiCenso* is equally applicable here. Particularly relevant, and indeed by itself determinative here, is the holding in *Lemon* that the Pennsylvania statute involved the State in unconstitutional entanglement because "schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of secular as distinguished from the religious instruction" (403 U.S. at 621).

5. Time and Place

It should not be assumed that tuition grant statutes are a new device recently fashioned to evade constitutional prohibitions, state and Federal, against tax-financing of sec-

tarian schools.[12] As long ago as 1938, the New York Court of Appeals could say:

> • • • The courts of this country have been unanimous in prohibiting the use of public funds to pay directly or indirectly, tuition fees of pupils in private or sectarian schools. *Judd* v. *Board of Education,* 278 N.Y. 200, 215. Overruled on other grounds in *Board of Education* v. *Allen,* 20 N.Y.2d 109.

Our research has failed to disclose any decision, state or Federal, which has upheld the constitutionality of a law for grants to pay for tuition to church schools. The decisions to the contrary are legion. Among them we cite only the following: *Williams* v. *Board of Trustees,* 173 Ky. 708 (1917); *Opinion of the Justices,* 259 N.E.2d 564 (Mass. Sup. Jud. Ct., 1970); *Almond* v. *Day,* 197 Va. 419, 89 S.E.2d 851 (1955); *Swart* v. *South Burlington School District,* 122 Vt. 177, 167 A.2d 514, *cert. den.,* 366 U.S. 925 (1961); *Hartness* v. *Patterson,* 179 S.E.2d 907 (S. Car. 1971).

None of the cases, Federal or state is distinguishable on the ground that the statute there invalidated applied to all parents whereas in the present case the statute is purportedly limited to parents with incomes which do not exceed $5,000. This, of course, is in reality not so. The tuition grant section is indeed so limited but that section is only part of the statute. Parents with incomes exceeding $5,000 are covered in Sections 3, 4 and 5 which provide for tax credits. The statute is a single package with a single purpose—to aid religious schools by financing tuition payments to them, and as we will seek to show in the next part of this

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[12] Or, as we have seen, racially segregated schools. See cases cited *supra* note 10.

brief, as far as the Constitution is concerned there is no difference between the methods which the ingenuity of determined legislators creates.

However, even if we consider the tuition grants section *in vacuo,* the attempted distinction is unpersuasive. There is probably not a single statute invalidated by this Court in *Lemon, DiCenso,* and *Sanders* v. *Johnson,* 403 U.S. 955 (1971) and uniformly by the District Courts which does not contain a legislative finding that unless the aid provided for in the statute is given the parents will be unable to send their children to the nonpublic schools. Nor is there probably any brief or oral argument made in these cases in which this argument was not forcefully made by both counsel for the states and for intervening parents.

As of the present, no court has been persuaded. Indeed, in *Lemon* v. *Sloan* the District Court turned the argument around and used it to emphasize the unconstitutionality of the law, saying:

> Second, we conclude that the effect of the Act is to aid the schools and therefore the failure of the state to insure that the funds are restricted to secular education or general welfare services renders the Act unconstitutional. Parents are eligible to receive payments under the Act because they have paid tuition at a nonpublic school. Tuitions are the "very life blood" of private educational institutions, *Almond* v. *Day,* 197 Va. 419, 427, 89 S.E.2d 851, 857 (1955), because they are the source from which many educational services, secular as well as religious, are funded. If parents cannot afford to pay the tuition, they must take their child out of the nonpublic schools and if enough parents are

unable to pay these costs, the schools will be forced to close. It was precisely this possibility that led the Pennsylvania General Assembly to pass the Act under review. By providing parents with additional funds because they have paid tuition at nonpublic schools, the Commonwealth is trying to insure the continued ability of the parents to afford tuition costs and therefore the continued existence of nonpublic schools, including sectarian schools. The necessary effect of such a program, if it is to succeed, is that the schools will be aided by state funds. The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid these schools (Jurisdictional Statement in Sloan v. Lemon, 72-620, pp. 13a-14a).

C. *Tax Credits*

1. The Provisions of Sections 3, 4 and 5

We have summarized the provisions of Sections 3, 4 and 5 of the Act in our Statement of the case (*supra*, pp. 5-6). Here we emphasize that while the statute speaks in terms "deductions," "subtract[ions]," "exclusions" and "modification" (JS 53a), it is obvious that what is intended is not the usual deduction but a tax credit, i.e., a reduction in the amount owed to the State by the taxpayer computed after all deductions from his gross income have been taken, including the standard deduction allowed to taxpayers who do not itemize their contributions.

Chapter 414 is not a tax deduction statute. Contributions to church schools are already deductible under New York law, and Chapter 414 specifically provides that the benefits are available even if the taxpayer elects not to itemize his

contributions. Moreover, and most important, in deductions the amount excluded from reportable income is the amount of the contribution; Chapter 414 does not measure the exclusion by the amount of tuition paid by the taxpayer but by the amount of his gross income and the number of children he has in school. There is a great difference between a deduction of $150 from the reportable income of a man with three children attending a nonpublic school and a deduction of $3,000, which is what Chapter 414 authorizes. What the State has done in Chapter 414 is simply to figure out for each eligible taxpayer what he has to deduct in his tax return in order to effectuate the tax credit intended by the legislature.

This was recognized not only in Judge Hays' partial dissent (JS 44a), but also in Judge Gurfein's majority opinion. He opens this part of his opinion with the statement that "The third part of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stand in different case" (JS 32a). Elsewhere in his opinion he states unqualifiedly that the statutory benefit "is in effect a tax *credit* since the exemption is not intended to equal the parents' outlay" (JS 352. Emphasis in original).

We also call the Court's attention to the "Question Presented" in the Motion to Affirm of appellee Senator Earl W. Brydges, the legislative leader of the measure, in No. 72-694:

> The Question presented in this appeal is the constitutionality under the First Amendment of Sections 3, 4 and 5 of Chapter 414 of 1972 Laws of New York State, which provide tax *credits* for tuition paid by parents for their children enrolled in nonpublic schools. (P. 2. Emphasis added.)

On December 29, 1972, the United States District Court for the Southern District of Ohio (Eastern Division) in the case of *Kosydar* v. *Wolman* issued a unanimous decision that the State's law providing tax credits for tuition paid to church schools violates the Establishment Clause. The Court's opinion is a comprehensive and in-depth analysis of the constitutional issues and the relevant precedents, and we respectfully commend it to this Court's attention. The position expressed in that opinion is that deductions and credits for tuition are, like grants, equally unconstitutional. (Text accompanying footnote 10. The pages in the slip opinion available to us are unnumbered.) Professor Paul Freund is of the same view. "A deduction or credit for expenses of nonpublic school attendance," he states, "would not in my judgment stand on a surer ground than grants to pupils for that purpose" (Legal and Constitutional Problems of Public Support for Nonpublic Schools, Submitted to the President's Commission on School Finance, p. 99).

The Court need not reach this question in the present case. A decision can be deferred until such time as a case is brought before the Court which involves a bona fide deduction from gross reportable income of amounts paid for tuition to church schools. Here, we submit, the Court should treat Chapter 414 as the District Court did, namely the functional and constitutional equivalent of the undisguised tax credit law struck down in *Kosydar* v. *Wolman*.

2. Subsidization

There may be some differences between tuition grants and tax credits, but we do not believe they rise to constitutional dimensions. Hence, should the Court decide that Section 2 of the Act does not violate the Establishment

Clause, we are unable to see how it could hold otherwise in respect to Sections 3, 4 and 5. We are frank to admit that this is a concession which concedes very little; for if tuition grants are upheld, few legislatures will resort to the devious route of credits. The tax credit law invalidated in *Kosydar* was enacted because Ohio's tuition grant law had already been held unconstitutional in *Wolman* v. *Essex.*

This equation, however, works both ways; if tuition grants constitute impermissible subsidization so too do tax credits. The fact that the subsidization is effected by a tax statute does not render it beyond Establishment restrictions. Concededly, legislatures have wide discretion in allowing deductions, credits and exemptions, but *Walz* establishes that it must be exercised within the confines of the First Amendment. (*Cf.* also *Speiser* v. *Randall,* 357 U.S. 513 (1958); *First Unitarian Church of Los Angeles* v. *County of Los Angeles,* 357 U.S. 545 (1958)).

In *Walz,* the Court refused to equate tax exemption with subsidization because in the former "government does not transfer part of its revenue to churches" (397 U.S. at 675). But if, as we believe, credits are not distinguishable, realistically or constitutionally, from tuition grants, and if, as we have sought to show in respect to Section 2 of the Act, the latter are a form of subsidization, then credits unlike exemptions do transfer part of government revenue to church schools.

We are unable to discern any difference, in law or fact, between a situation in which a person sends to the State a check for the amount he owes on his tax return and independently thereof sends the State his tuition receipt and gets back a check for all or part of the amount shown

thereon, and the situation in which he computes his tax liability as in the first case but instead of sending the State a check for that amount sends in his tuition receipt. Two persons with the same income and the same allowable deductions owe the same amount to the State; one has no children attending church schools and he sends the State a check for the amount he owes. The other sends a receipt from the church school attended by his children. How can it be said that the State has not paid the tuition for him?

In *Walz,* the Court noted that churches receiving tax exemption for their property are treated exactly as other nonprofit institutions, such as libraries, art galleries, or hospitals and that it could not be contended that the exemption accorded to them constitutes a subsidization. But the tax benefit enjoyed by these institutions would be the same as those granted by Chapter 414 only if the patron of an art gallery could send to the State in payment of his tax liability a receipted bill for his dues or a patient could do the same with his hospital bill.

Chapter 414 on its face shows the unreality of any attempted distinction between credits and grants. Sections 3, 4 and 5 accord credits to parents with incomes of $5,000 and over. But few parents with incomes of less than $5,000 pay New York State income taxes so that credits would be of no avail to them. Accordingly, they are given instead tuition grants to achieve the same purpose. It is no coincidence that, as is evident from the table of estimated net benefits set forth in note 3, *supra,* tax benefits begin just about where tuition benefits stop, i.e., about $50 per child.

This Court has found no constitutional difference between tuition grants and tax credits in an Equal Protection con-

text. (*Griffin* v. *County School Board*, 377 U.S. 218, 223 (1964)). For the reasons we have already stated (*supra*, pp. 33-34), we suggest that this is equally true in an Establishment context.

3. Purpose and Effect

In view of our position that credits and tuition grants are constitutionally indistinguishable, what we have said in respect to the latter under the purpose-effect test (*supra*, pp. 35-37) is applicable here and need not be repeated.

4. Entanglement

Here, again, what we have said about entanglement in respect to tuition grants (*supra*, p. 37) is equally applicable here. One aspect of this test which, as will be seen shortly, is particularly appropriate here, has not been discussed and merits serious consideration.

Initially, we note that in New York (and this is substantially the case in most other States) all but 6.5% of the nonpublic schools are religious schools, and of the 6.5%, some are profit schools and hence not within the coverage of Sections 3, 4 and 5. ("The Collapse of Nonpublic Education: Rumor or Reality?" Report on Nonpublic Education in the State of New York for the New York State Commission on the Quality and Financing of Elementary and Secondary Education, Vol. 1, p. I-6.) Of the nonpublic school students, 84.5% are Catholic. (*Ibid.*, p. I-5.) With this factual background, we quote the following from *Lemon-DiCenso* (403 U.S. 622-623. Citations omitted):

> A broader base of entanglement of yet a different character is presented by the divisive political poten-

tial of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. Walz v. Tax Commission. To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and

problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.

Of course, as the Court noted in *Walz*, "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues." We could not expect otherwise, for religious values pervade the fabric of our national life. But in *Walz* we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.

We have set forth this extensive quotation because the following story which appeared in the *New York Times* of August 7, 1972 presents almost a casebook illustration of its validity and relevance:

> The Nixon Administration and the Democratic party —the latter in the person of Representative Wilbur D. Mills—are vying for the Roman Catholic vote with a plan for a new form of tax assistance to parochial schools.
>
> Less openly, the two sides may also be competing to attract some Southern segregationist votes with the same tax-aid plan, which would apply to all private pri-

mary and secondary schools, not just to those with religious affiliation.

The legislation was originally devised by a Catholic member of Congress, Representative Hugh L. Carey, Democrat of Brooklyn. It is being sponsored by Mr. Mills, an Arkansas Democrat, who has a long record of opposition to tax credits on principle. The measure has also been endorsed by the Nixon Administration, though it opposed similar proposals in the previous years.

• • • • •

Mr. Carey, in discussing his bill, speaks frankly of the political, as well as the substantive, merits that he sees in it.

He said that he had no trouble in gaining Mr. Mills' support for the measure "once the chairman went national"—that is, once Mr. Mills, the chairman of the House Ways and Means Committee, decided to make a bid for the Democratic Presidential or Vice-Presidential nomination.

With Mr. Mills's hope for a place on the ticket now dashed, his main political aim in scheduling hearings next week on the Carey-Mills bill, Mr. Carey thinks, is to blunt the President's appeal to the Catholic, the elderly and other interest groups. • • •

5. Time and Place

As we have noted (*supra*, p. 20), the Court in *Walz* relied heavily on the longevity and ubiquity of tax exemptions as indicative of constitutionality. But Chapter 414 is not a tax-exemption statute. The property of church schools is already tax exempt under New York Real Property Tax Law §420(1), and Chapter 414 adds nothing to that.

Tax credits, however, are a recent innovation, going back no further than *Brown* v. *Board of Education*, 347 U.S. 483, in 1954. It owes its existence, both to the *Brown* and present context, to the ingenuity of lawyers seeking to open new avenues through constitutional barriers as promptly as old ones are closed by the courts. In both the *Brown* and present context, these efforts have heretofore proved almost uniformly unsuccessful. We urge the Court not to allow it to become successful now.

III.

Sections 3, 4 and 5 are inseverable from Section 2 and cannot stand alone.

With practically no discussion, other than a citation of *Tilton* and *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 200, 234 (1932), the District Court held that Sections 3, 4 and 5 of the Act are separable from Sections 1 and 2. We respectfully suggest that Judge Hays' response is far more persuasive. He states (JS, pp. 45a-46a):

> The tax benefit statute was quite frankly enacted as a substitute for partial subsidies to parents who pay tuition to religious schools. It goes hand in hand with section 2. The benefits for section 3 parents begin at approximately the point where the grants to section 2 parents leave off.
>
> As a matter of fact section 3 is so closely bound up with section 2 that the invalidity of section 3 follows from its relationship to section 2. If it is evident that the legislature would not have enacted the part of the statute that is claimed to be within its power independently of that which is not, the statute is wholly

invalid, regardless of the inclusion of a separability clause. *Champlin Refining Co.* v. *Corporation Commission,* 286 U.S. 210, 234 (1932). It is obvious that the New York state legislature would not have enacted section 3 benefiting the wealthier parents had they not intended it to be a complement to section 2 benefiting low income parents. Section 3 must therefore fall if section 2 is unconstitutional, as we have held it is.

We add only that holding Sections 3, 4 and 5 inseverable from Section 2 (and Section 1) does not make the severability clause superfluous. It serves the important and we submit intended purpose of preserving parts 4 and 5 of the Act, the need for which is obviously predicated on the invalidation rather than the upholding of the other parts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed in respect to Sections 1 and 2 of Chapter 414 and reversed in respect to Sections 3, 4 and 5 thereof.

Respectfully submitted,

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